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**UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA**

CARLOS VICTORINO, *et al.*

Plaintiffs,

v.

FCA US LLC,

Defendant.

Case No. 3:16-cv-01617-GPC-JLB

**FCA US LLC'S MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 SUPPORT OF ITS *EX PARTE* MOTION
 TO STRIKE PLAINTIFFS'
 RESPONSES TO STATEMENT OF
 UNDISPUTED MATERIAL FACTS
 AND TAREK H. ZOHDY
 DECLARATION**

Complaint Filed: June 24, 2016

Trial Date: None Set
 Hearing Date: n/a
 Time: n/a
 Courtroom: 2D
 Judge: Hon. Gonzalo P. Curiel

I. INTRODUCTION

During the briefing on FCA US LLC's pending motion for summary judgment, Plaintiffs apparently submitted two documents "under seal" to the Court that were not properly filed, and which were not contemporaneously served on FCA US: (1) Plaintiffs' Responses to Defendant's Statement of Undisputed Material Facts in Support of Summary Judgment ("Plaintiffs' SOF Response"); and (2) the Declaration of Tarek H. Zohdy in Support of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiffs' Request for Rule 56(d) Relief ("the Zohdy Declaration").¹

For the reasons set forth below, these documents are procedurally and substantively improper, and thus should be stricken. FCA US brings this motion *ex parte* because the issues raised herein directly affect the Court's consideration of the motion for summary judgment, which is already fully briefed and scheduled for oral argument on June 16, 2017. *See* Dkt. No. 51. The parties met and conferred on this issue on June 6, and FCA US has provided Plaintiffs with notice of its intent to file this *ex parte* motion to strike. *See below*, p. 8.

II. FACTUAL BACKGROUND

FCA US filed its motion for summary judgment on April 17, 2017. Dkt. No. 50. The Court then entered an order setting a briefing schedule that required any opposition by Plaintiffs to be filed by May 12, 2017, and any reply by FCA US to be filed by May 26, 2017. Dkt. No. 51.

On May 12, 2017, Plaintiffs publicly filed redacted copies of their summary judgment opposition brief, declarations by Karen Wallace and Michael Stapleford (and attached exhibits), and a counter statement of material facts. Dkt. No. 55. That same day, Plaintiffs lodged these documents *and apparently others* as well

¹Plaintiffs' SOF Response and the Zohdy Declaration are attached, respectively, as Exhibits D and E to the Declaration of Thomas L. Azar, Jr., filed herewith.

1 with the Court under seal. *See* Dkt. No. 54. The documents lodged with the Court
2 under seal were not viewable by FCA US.

3 When Plaintiffs made their public redacted filings on May 12, 2017, they
4 failed to serve FCA US with unredacted copies of them. Accordingly, on May 15,
5 2017, FCA US contacted Plaintiffs to request unredacted copies of the materials.
6 Declaration of Thomas L. Azar, Jr. (“Azar Decl.”), ¶ 4. The request was complied
7 with later that day via email service. *Id.* at ¶ 5. However, Plaintiffs did not serve
8 FCA US with the “other” documents they had apparently lodged with the Court
9 under seal, *i.e.*, Plaintiffs’ SOF Response and the Zohdy Declaration. *Id.*

10 FCA US filed its reply brief in support of summary judgment on
11 May 26, 2017, completing the briefing on its summary judgment motion. *See* Dkt.
12 No. 65. Almost a week after this filing, on June 1, 2017, Plaintiffs contacted
13 FCA US, stating that two documents had been lodged with the Court under seal on
14 May 12, 2017, but had never been served on FCA US in any manner.² Azar Decl.,
15 ¶ 6. Later that day, Plaintiffs sent FCA US an email with Plaintiffs’ SOF Response
16 and the Zohdy Declaration. *Id.* at ¶ 7.

17 **III. ARGUMENT**

18 **A. The Untimely Documents Should Be Rejected by the Court.**

19 To survive a motion for summary judgment, Plaintiffs were required to set
20 forth specific facts showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e);
21 *see also Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). If Plaintiffs wished to
22 dispute any of the facts set forth in FCA US’s Statement of Undisputed Material
23 Facts (Dkt. No. 50-2), they needed to file a response, identify the specific facts

24 _____
25 ²Plaintiffs have since sought to have the documents unsealed. *See* Plaintiffs’
26 Motion to Withdraw, Dkt. No. 68. In doing so, Plaintiffs represented to the Court
27 that FCA US “would not oppose Plaintiffs’ request to unseal the documents.” Dkt.
28 No. 68, p. 3. But, what FCA US’s counsel actually said was that it would not
oppose a motion to unseal (since there is no reason the two documents at issue
should be sealed), but that FCA US did not consider the documents to be properly
or timely filed or served, and they should not be considered by the Court when
deciding FCA US’s motion for summary judgment. *See* Azar Decl., ¶ 11.

1 being disputed, and proffer “evidence on which the jury could reasonably find for
 2 [them].” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). If Plaintiffs
 3 wished to seek a delay to conduct further discovery, they needed to file an affidavit
 4 or declaration setting forth the particular facts they expected to develop from
 5 further discovery, and explain how those facts would preclude summary judgment.
 6 Fed. R. Civ. P. 56(d); *see also Pac. Coast Metal Trades Dist. Council*, 817 F.2d
 7 1391, 1395 (9th Cir. 1987).

8 The failure to timely file and serve such materials is a waiver, and untimely
 9 filings are properly ignored by the Court. *See, e.g., Rogers v. Grijalva*, 2013 WL
 10 5492530, at *4 (E.D. Cal. Oct. 1, 2013) (accepting defendants’ statement of facts as
 11 true and granting summary judgment where “Plaintiff failed to file a ... statement
 12 admitting or denying the facts as set forth by Defendants”); *Cook v. Allstate Ins.*
 13 *Co.*, 337 F. Supp. 2d 1206, 1209 (C.D. Cal. 2004) (denying plaintiff’s request for
 14 delay to conduct further discovery where the declaration required by Rule 56(d)
 15 was not filed); *see also Baker v. Ensign*, 2015 WL 5568044, at **1-2 (S.D. Cal.
 16 Sept. 22, 2015) (sustaining defendants’ objection to summary judgment opposition
 17 that was filed seven days late, refusing to consider arguments raised by plaintiff
 18 therein, and granting defendants’ motion).³

19 Plaintiffs’ SOF Response and the Zohdy Declaration were never properly
 20 filed or served. Indeed, they were not provided to FCA US until a week after its
 21 reply brief was filed, which was after all briefing on the summary judgment motion
 22 had concluded. They should therefore be stricken by the Court.

23 **B. Plaintiffs’ Response To FCA US’s Statement of Facts Is Improper.**

24 Even if this Court were inclined to ignore the improprieties engaged in by
 25 Plaintiffs, it should still disregard the response to the Statement of Facts. Disputing
 26

27 ³The Court’s authority to strike untimely or improper documents is beyond
 28 dispute. *See, e.g., Sierra Pac. Indus. v. U.S. Dept. of Agriculture*, 2012 WL
 245973, at *3 (E.D. Cal. Jan. 25, 2012) (collecting cases).

1 a fact on summary judgment requires more than argument or supposition; it
 2 requires actual **evidence**. *See, e.g., Cooper v. United Air Lines, Inc.*, 82 F. Supp. 3d
 3 1084, 1104 (N.D. Cal. 2015) (“Plaintiff cannot create a dispute of material fact
 4 without any evidence that actually creates a dispute”). Here, Plaintiffs’ SOF
 5 Response proffers no such evidence. It is nothing more than an attempt by
 6 Plaintiffs to manufacture a series of imaginary “disputes” that simply do not exist.

7 For example, Plaintiffs “dispute” five direct quotes from the warranties
 8 applicable to all 2013 and 2014 model-year Dodge vehicles (including, of course,
 9 Plaintiffs’ vehicles). Azar Decl., ¶ 9, Ex. D, Pls.’ SOF Response, ¶¶ 2-3, 21-23.
 10 Plaintiffs bizarrely object that each quote “is supported by a document produced by
 11 FCA,” and then argue that the warranty booklet quoted “has not been properly
 12 authenticated.” *See id.* at ¶ 3. In actuality, all of the exhibits submitted by FCA US
 13 were authenticated in the Declaration of Stephen D’Aunoy, which was submitted
 14 by FCA US along with its summary judgment motion. Dkt. No. 50-3, ¶¶ 3, 10.
 15 Moreover, Plaintiffs have apparently forgotten that they themselves produced
 16 Victorino’s own warranty booklet during discovery,⁴ and that booklet contains all
 17 of the same quoted provisions that Plaintiffs now disingenuously claim are
 18 “disputed.” Azar Decl., ¶ 13. By challenging the authenticity of a warranty that
 19 Plaintiffs themselves produced in discovery, and thus obviously know to be
 20 authentic, it is highly questionable whether Plaintiffs have complied with the duty
 21 of candor they owe to this Court. *See, e.g., Cal. Bus. & Prof. Code*, § 6068(d).

22 Plaintiffs likewise fail to be candid with this Court when they dispute the
 23 “authenticity” of a July 2016 repair invoice for Tavitian’s vehicle. Azar Decl., ¶ 9,
 24 Ex. D, Pls.’ SOF Response, ¶ 34. That record was, of course, properly
 25 authenticated by declaration. *See* Dkt. No. 50-3, ¶ 14. More importantly, Plaintiffs

26
 27 ⁴Tavitian either lost or refused to produce the warranty information booklet
 28 that came with his vehicle but, as shown by FCA US’s exhibits, the relevant
 warranty provisions for all model-year 2013 and 2014 Dodge Darts are the same.
See Dkt. No. 50-2, ¶¶ 2-3, 21-23.

1 have repeatedly cited and relied upon that exact same repair record (FCA US's
2 Exhibit M) as part of their own opposition to summary judgment. *See, e.g.*, Dkt.
3 No. 55, pp. 10, 16.

4 Plaintiffs also, inexplicably “dispute” many of FCA US's stated facts, but
5 then immediately do an about-face and admit the exact fact they just said they are
6 “disputing.” For example, FCA US Statement of Fact No. 14 states that
7 “Victorino's clutch master cylinder has never been replaced or repaired.” Dkt. No.
8 50-2, ¶ 14. Plaintiffs' response, in its entirety, is as follows:

9 ***Disputed.*** FCA's “fact” is argumentative and assumes
10 facts not in evidence. ***Plaintiff Victorino's clutch master***
11 ***cylinder has not yet been replaced.*** Documents provided
12 to Plaintiff Victorino by authorized FCA personnel do
13 not definitively exclude problems or “repairs” with the
14 clutch master cylinder.

15 Azar Decl., ¶ 9, Ex. D, Pls.' SOF Response, ¶ 14 (emphasis added). Likewise,
16 Plaintiffs' response to Statement of Fact No. 11 (“Victorino's flywheel was
17 replaced at no charge”) purports to “dispute” but then admits the exact fact
18 identified:

19 ***Disputed.*** FCA's “fact” is inaccurate to the extent that it
20 is argumentative and assumes facts not in evidence.
21 ***Authorized personnel replaced the flywheel at “no***
22 ***charge” to Plaintiff Victorino.***

23 *Id.* at ¶ 11 (emphasis added). Plaintiffs' SOF Response is replete with numerous
24 other examples of denials that really deny nothing when closely read. *See, e.g., id.*
25 at ¶¶ 8-9, 13, 15, 18, 25-28, 30, 32, 35.

26 Plaintiffs know they cannot dispute these or the other facts submitted by
27 FCA US, so they turn to word games in an apparent attempt to confuse the Court.
28 For example, when FCA US summarizes a document, Plaintiffs claim the

underlying fact is “disputed” and “inaccurate to the extent it paraphrases and thus misstates the document.” *See, e.g., id.* at ¶ 24. Yet, they do not identify anything that is actually misstated. When FCA US quotes from a document, Plaintiffs dispute that too, complaining that the quote “fails to mention” other, irrelevant information. *See, e.g., id.* at ¶ 33. When FCA US quotes from Plaintiffs’ own discovery responses, Plaintiffs claim that these are somehow not “admissions.” *See, e.g., id.* at ¶¶ 18, 37. And, faced with the undeniable fact that Tavitian tampered with (and actually replaced) the odometer in his vehicle, Plaintiffs argue that responding would “violate[] Plaintiff Tavitian’s Due Process rights pursuant to the Fourteenth Amendment of the United States Constitution.” *Id.* at ¶ 29. Apparently, Plaintiffs thought that sounded better than just asserting Tavitian’s rights under the Fifth Amendment.

What Plaintiffs were required to do, but have failed to do, is provide actual evidence showing there is some genuine issue of fact for trial. *Taylor*, 880 F.2d at 1045; *Cooper*, 82 F. Supp. 3d at 1104. Accordingly, for this reason too, Plaintiffs’ SOF Response is improper and should be stricken.

C. The Zohdy Declaration Is Also Deficient.

The Zohdy Declaration is not only untimely, but utterly fails to satisfy the requirements of Rule 56(d). A party seeking relief under Rule 56(d) must show: (1) “it has set forth in affidavit form the *specific facts* it hopes to elicit from further discovery”; (2) “the facts sought exist”; and (3) “the sought-after facts are essential to oppose summary judgment.” *Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008) (emphasis added); *see also* Fed. R. Civ. P. 56(d). It must also “demonstrate that allowing additional discovery would ... preclude[] summary judgment.” *Bank of Am., NT & SA v. PENGWIN*, 175 F.3d 1109, 1118 (9th Cir. 1999).

The Zohdy Declaration comes nowhere close to satisfying these requirements. It simply argues that Plaintiffs need additional time to “review and

1 analyze [a] voluminous document production” they received in April, to take
 2 various depositions, and to “meet and confer” on a subpoena to a third party. Azar
 3 Decl., ¶ 10, Ex. E, Zohdy Decl., ¶ 38. Plaintiffs even complain that (at the time)
 4 FCA US had not yet inspected one of Plaintiffs’ own vehicles. *Id.* at ¶ 4. Rather
 5 than setting forth specific facts that further discovery will elicit, Plaintiffs offer a
 6 list of general topics they would like to explore, such as “the history of the alleged
 7 defect,” “whether [other] customers continued to complain about the alleged defect
 8 after FCA’s corrective actions,” and “what involvement third parties have, if any.”
 9 *Id.* at ¶ 40. Plaintiffs claim, without any explanation, that additional discovery into
 10 these broad topics will “further confirm the existence of the Clutch System defect
 11 and its impact on Plaintiffs’ vehicles.” *Id.* Notably, Plaintiffs do not even explain
 12 whether the additional discovery sought relates to the defect actually alleged in the
 13 operative Complaint (prematurely wearing seals in the clutch master cylinder), or
 14 whether it instead goes to the brand-new defect their “expert” first raised in
 15 response to FCA US’s summary judgment motion (a “wobbling” slave cylinder).

16 This Court has routinely, and correctly, rejected similarly vague Rule 56(d)
 17 applications. *See, e.g., Abbit v. ING USA Annuity & Life Ins. Co.*, 2017 WL
 18 2123616, at **22-23 (S.D. Cal. May 16, 2017) (rejecting Rule 56(d) application
 19 where the plaintiff simply recited a similar list of “broad and nonspecific” topics,
 20 rather than “specific facts” that would require the denial of defendant’s summary
 21 judgment motion). Furthermore, the summary judgment motion now before the
 22 Court is narrowly focused on two specific issues: (1) whether ***there is any***
 23 ***evidence of the defect actually alleged in the operative Complaint***; and
 24 (2) whether that defect caused the need for Plaintiffs to seek repairs of their own
 25 vehicles. *See* Dkt. No. 50-1, pp. 1, 7-11. The evidence on those issues is the
 26 vehicles themselves, the records of the repairs they received, and any parts that
 27 were repaired or replaced—*i.e.*, evidence that is already available to Plaintiffs, and
 28 sitting in their own files or garages. *See Abbit*, 2017 WL 2123616, at *22 (no delay

under Rule 56(d) was warranted where evidence and facts on the issue presented were “within Plaintiff’s control”).

The Zohdy Declaration should be stricken because it is not only untimely, it fails to satisfy the requirements of Rule 56(d).

III. FCA GAVE TIMELY NOTICE OF THIS *EX PARTE* MOTION

On June 6, 2017, FCA US’s counsel and Plaintiffs’ counsel participated in a telephone conference to discuss Plaintiffs’ failure to properly file or serve these documents. Azar Decl., ¶ 11. Pursuant to CivLR 83.3(g)(2), on June 7, 2017, at approximately 7:20 a.m. (pacific), FCA US’s counsel emailed Plaintiffs’ counsel (Jordan Lurie, Tarek Zohdy, Cody Padgett, and Karen Wallace), informed them of FCA US’s intent to file this *ex parte* motion before the close of business that day, and explained the basis for the motion. *Id.* at ¶12.

IV. CONCLUSION

For the reasons set forth herein, Defendant FCA US LLC respectfully requests that this Court strike Plaintiffs’ Responses to Defendant’s Statement of Undisputed Material Facts in Support of Summary Judgment; and the Declaration of Tarek H. Zohdy in Support of Plaintiffs’ Opposition to Defendant’s Motion for Summary Judgment and in Support of Plaintiffs’ Request for Rule 56(d) Relief.

Dated: June 7, 2017

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served on June 7, 2017 on all counsel of record, who are deemed to have consented to electronic service via the Court's CM/ECF system per Civ.L.R. 5.4(d).

By: /s/ Edwin Boniske
Edwin Boniske (Bar No. 265701)